



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**JESUS GUTIERREZ v. INDUSTRIAL COMMISSION
CV-10-0285-PR**

PARTIES:

Petitioner: Jesus Gutierrez

Respondents: Masterson & Clark Framing, Inc., Respondent Employer, and SCF Arizona, Respondent Carrier

Amicus Curiae: Arizona Association of Lawyers for Injured Workers

FACTS:

Mr. Gutierrez sustained a work-related injury for which he received workers' compensation benefits. His doctor released him to return to work with physical restrictions. SCF, the workers' compensation insurance provider, closed the claim, finding no permanent impairment [see definition below] and indicating it intended to stop paying benefits. Mr. Gutierrez protested the closure, arguing that he continued to have persistent, severe low back pain that radiated to his right thigh.

Mr. Gutierrez was examined by SCF's independent medical examiner, Dr. Kevin Ladin, and by his treating orthopedic surgeon, Dr. Ali Araghi. Both agreed that Mr. Gutierrez had a protruding disc, but they reached opposite conclusions as to whether (a) his condition was related to his work injury and (b) the injury had resulted in permanent impairment. Dr. Ladin concluded the disc protrusion was not work-related, but resulted from degenerative disc disease. Using the sixth edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* (AMA Guides), Dr. Ladin found no permanent impairment. On the other hand, Dr. Ali Araghi believed the herniated disc had probably existed before Mr. Gutierrez was injured, but the work injury had aggravated it. Using the fifth edition of the AMA Guides, he concluded Mr. Gutierrez did have a permanent impairment as a result of the work injury, which could entitle Mr. Gutierrez to continuing benefits.

The Administrative Law Judge found Dr. Ladin's opinions to be more probably correct and entered an award finding Mr. Gutierrez had no permanent impairment as a result of the work injury.

Mr. Gutierrez raised three issues on appeal. First, he argued Dr. Ladin's opinion was legally insufficient to support the award because the Industrial Commission's relevant rule (Rule 113(B)) requires use of the fifth edition of the AMA Guides to rate permanent impairment, as that was the edition in effect in 2001 when the current version of the rule was adopted. Dr. Ladin,

however, relied on the sixth edition, which was published in 2007.

The court of appeals rejected the argument. Rule 113(B) provides that when an injured worker is discharged from treatment, the doctor “should rate the percentage of impairment [the injured worker has sustained as a result of the work injury] using the standards for the evaluation of permanent impairment as published by the most recent edition of the [AMA Guides], if applicable[.]” The court noted that the prior version of the rule, adopted in 1987, is essentially the same as the 2001 version, except that it lacks the phrase “the most recent edition.” In 1987, the second edition of the AMA Guides was in effect. Between 1987 and 2001, each successive edition became the one used in Arizona to evaluate and rate permanent impairment. The court concluded that adding the phrase “the most recent edition” to Rule 113(B) recognized the policy of using the latest edition of the AMA Guides, which is based on the latest evidence in diagnostic and clinical tests and the latest scientific research by recognized experts. Thus, the rule should be construed to require use of the edition in effect at the time an injured worker is evaluated for permanent impairment.

Second, Mr. Gutierrez argued that, assuming Rule 113(B) authorizes use of the sixth edition, such authorization unlawfully delegates to the AMA the Industrial Commission’s authority to rate permanent impairment. The court found no unlawful delegation of authority because, although use of the AMA Guides is generally required, the doctor rating the impairment retains some discretion whether to use the Guides. A doctor may rely on the AMA Guides if he or she finds it to be an appropriate measure of impairment, but if not, the doctor may use other appropriate criteria. See *Simpson v. Industrial Commission*, 189 Ariz. 340, 344-45, 942 P.2d 1172, 1176-77 (App. 1997) (recognizing that, if the Guides do not cover or permit an accurate assessment of an injured worker’s impairment, the impairment may be established by other means). The court adopted the reasoning of *Madrid v. St. Joseph Hospital*, 928 P.2d 250, 256-59 ¶ 11-23 (N.M. 1996), which held that use of editions of the AMA Guides published after a rule is enacted is not an unlawful delegation of authority, citing among other reasons, the practical necessity of adopting a changeable standard, the distinction of the medical professionals who compile the AMA Guides, and the doctors’ ability to exercise their discretion in using the AMA Guides.

Finally, Mr. Gutierrez argued that use of the sixth edition violated Article 18, § 8 of the Arizona Constitution by reducing the compensation he might otherwise be entitled to receive. Article 18, § 8 states that “[t]he percentages and amounts of compensation provided” by the legislature “shall never be reduced . . . except by initiated or referred measure as provided by this Constitution.” The court concluded that use of the sixth edition of the AMA Guides did not unconstitutionally deprive Mr. Gutierrez of benefits to which he was previously entitled. Even if the fifth edition were used, he would not be guaranteed an award of permanent disability benefits because a finding of impairment would simply permit him to proceed to a determination of his lost earning capacity, if any. Further, although the sixth edition no longer contains a numerical impairment rating for Mr. Gutierrez’s condition, and the fifth edition does, his treating doctor could still rate the impairment by other appropriate means according to Rule 113(B).

ISSUES:

1. Did the Court of Appeals err in holding that Rule A.A.C. R20-5-113 B, (“Rule”) contained the “unstated proposition” that the Sixth Edition [of the AMA Guides to the Evaluation of Permanent Impairment] applied and that the phrase “the most recent edition” meant that Petitioner’s physical impairment rating was not to be assessed by the standard in effect when the Rule was adopted, the Fifth [Edition of the AMA Guides], but, rather, by the Sixth [Edition] which was not in existence when the Rule was adopted?
2. Did the Court of Appeals err by holding that the Rule lawfully delegated authority to the AMA? In so doing did the Court misconstrue the Supreme Court opinion in *State v. Williams*, 119 Ariz. 595, 583 P.2d 251 (1978)? [Quotation from *Williams* omitted.]

DEFINITIONS:

“Permanent impairment” means a finding by a medical doctor that an injured worker has some permanent physical impairment caused by a work-related injury. This finding then permits the worker to show that he has lost earning capacity as a result of the injury and is entitled to workers’ compensation benefits.

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